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September 27, 1993

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

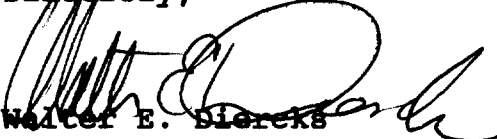
Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Room 222  
Washington, D.C. 20554

93-191 /

Dear Mr. Caton:

Transmitted herewith on behalf of KKTU, Inc. are an original and four copies of the Comments of KKTU, Inc.

Sincerely,

  
Walter E. Diercks

WED/kn  
Enclosure

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SEP 27 1993

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Amendment of Section 73.606(b)  
Table of Allotments  
TV Broadcast Stations  
(Pueblo, Colorado)

)  
)  
)  
)

MM Docket No. 93-191  
RM 8088

To: The Commission

REPLY COMMENTS OF KKTU, INC.

James L. Winston  
Walter E. Diercks  
Rubin, Winston, Diercks,  
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Dated: September 27, 1993

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## SUMMARY

The Commission should determine that the proposal of the University of Southern Colorado ("USC") and Sangre de Cristo Communications, Inc. ("SCC") to exchange channels is not in the public interest. The Commission also should terminate the rulemaking proceeding without adoption of an amendment to the Television Table of Allotments.

USC and SCC have failed to state their "continuing interest" in the channel swap proposed by the NPRM, despite the NPRM's requirement that they state such continuing interest. In fact, SCC and USC have stated that they have no interest in the channel swap proposed by the NPRM and will only accept a channel swap which includes an assignment to SCC of USC's construction permit.

The NPRM correctly modified SCC's authorization for Station KOAA-TV to specify the site in USC's current license. None of the cases cited by SCC and USC involved a licensed station transferring a construction permit for a short spaced site. SCC should not be able to gain the advantage of a short spacing waiver which was granted to USC based upon the unique public interest considerations presented by USC's situation prior to the channel swap proposal.

The attempt by USC and SCC to justify an extension of USC's expired construction permit is contrary to the facts and Commission policy. The facts presented by USC and SCC are an admission that the permitted facilities were not constructed due solely to the business decision of USC to defer expending money until the channel swap proposal was acted upon by the Commission. Commission

precedent clearly establishes that the pendency of a proposed transfer of a construction permit is not a valid basis for extension of a construction permit. In addition, USC's September 14, 1993 Supplement to its application for extension of its construction permit actually demonstrates that an extension should not be granted: USC now proposes to move to yet another site which would require a modification of its construction permit.

KKTV refutes the arguments of SCC and USC that the Commission cannot require SCC to file for its own short spacing waiver. The Commission grants short spacing waivers on a number of public interest factors, only one of which is the technical question of objectionable interference to other stations. USC addressed these other public interest factors in seeking a short spacing waiver for a Cheyenne Mountain site. Having argued that these factors supported the short spacing waiver it received, USC cannot now argue that those public interest factors cannot be considered by the Commission when analyzing whether SCC should be granted a waiver.

Approval of the channel swap under circumstances where SCC would be permitted to operate KOAA-TV from the Cheyenne Mountain site would result in 29,367 people losing their only off-air primary commercial service, while only 2,906 people would benefit from reception of their first off-air primary noncommercial service. Since any loss of service by an existing station is *prima facie* not in the public interest, this tremendous loss of commercial service mandates that the Commission find that the channel swap proposed by USC and SCC is not in the public interest.

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In the Matter of

Amendment of Section 73.606(b)	)	MM Docket No. 93-191
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(Pueblo, Colorado)	)	

To: The Commission

REPLY COMMENTS OF KKTV, INC.

KKTV, Inc. ("KKTV"), by its attorneys and pursuant to Sections 1.415 and 1.420 of the Commission's Rules and the Notice of Proposed Rulemaking, hereby submits its Reply Comments in the above-captioned rulemaking proceeding.<sup>1</sup>

I. The Joint Petitioners Have Stated A Lack Of "Continuing Interest," In Violation Of The Requirements Of The NPRM

1. The NPRM rejected the Joint Petitioners' proposal that Sangre de Cristo Communications, Inc. ("SCC") be permitted to operate KOAA-TV from the Cheyenne Mountain site set forth in the University of Southern Colorado's ("USC") construction permit. NPRM at ¶ 7. In their Joint Comments, USC and SCC assert that "...approval of the channel exchange proposal must include modification of the license for Station KOAA-TV to reflect the transmitter site authorized under the Cheyenne Mountain Permit." SCC/USC

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<sup>1</sup> These Reply Comments specifically do not address the issues raised by the application filed by SCC and USC on September 3, 1993 seeking Commission consent to assignment of USC's construction permit on Cheyenne Mountain from USC to SCC. KKTV will simply note here that this latest action by SCC and USC is a blatant attempt to address issues outside of this rulemaking proceeding which should have been addressed inside this proceeding. KKTV intends to file a petition to deny in the proceeding considering this September 3, 1993 application.

Joint Comments at 8-9 (emphasis added). In fact, in their Joint Comments, SCC and USC admit that, "SCC's continued interest in pursuing the proposed channel swap is...conditioned upon inclusion of the Cheyenne Mountain Permit in the swap proposal ultimately approved by the Commission." SCC/USC Joint Comments at 3 n. 3 (emphasis added).

2. Thus, in their Joint Comments, SCC and USC have made it clear that they do not accept the conditions for a channel swap set forth in the NPRM. This violates the instructions of the NPRM that the proponents of the channel swap must make a showing of "continuing interest." NPRM at ¶ 14 and ¶ 2 of the Appendix to the NPRM.

3. Since SCC and USC have expressly stated they do not have a "continuing interest" in the channel swap as proposed in the NPRM, the Commission should immediately terminate this proceeding without adoption of an amendment of the Television Table of Allotments because SCC and USC have failed to fulfill a condition precedent for consideration of the channel swap proposed in the NPRM.

**II. The NPRM Correctly Implemented Commission Policy By Proposing To Modify SCC's Authorization For KOAA-TV To Specify The Site In USC's Outstanding License For KTSC-TV**

4. SCC and USC take exception to the NPRM's conclusion that it was appropriate to modify SCC's authorization for Station KOAA-TV to specify the site in USC's outstanding license for KTSC-TV (Baculite Mesa), rather than the site in USC's construction permit (Cheyenne Mountain). SCC and USC complain that this action is "...contrary to well-established Commission precedent and policy." SCC/USC Joint Comments at 4. This complaint is unfounded.

5. USC and SCC argue that the Commission has permitted permittees (as distinguished from licensees) to exchange channels and cite Commission precedent to support their contention. An examination of the cited precedent reveals that none of the cited Commission actions is relevant to the instant situation.

6. In making their argument, SCC and USC admit that they are citing cases in which the Commission has approved the swaps of construction permits for unbuilt stations. SCC/USC Joint Comments at 6. Indeed, all of the precedent cited by SCC and USC in their Joint Comments involved permittees of unbuilt stations.<sup>2</sup> None of them involved a licensee of an existing station with a construction permit for short spaced facilities where the licensee failed to even commence construction and the construction permit has expired.<sup>3</sup>

7. SCC and USC attempt to gloss over the fact that USC is attempting to transfer its construction permit for a short spaced

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<sup>2</sup> Amendment of Section 73.606(b) (Gary, Indiana), MM Docket No. 86-80, RM-5303, 51 FR 30864, published August 26, 1986, petition for recon. dismissed, 1 FCC Rcd 975 ["Gary, Indiana"]; Amendment of Section 73.606(b) (Clermont, and Cocoa, Florida), 4 FCC Rcd 8320 (1989), recon. denied 5 FCC Rcd 6566 (1990) ["Clermont and Cocoa, Florida"]; Amendment of Section 73.606(b) (Boca Raton and Lake Worth, Florida) (NPRM), MM Docket No. 93-234, RM-8289, released August 26, 1993 ["Boca Raton and Lake Worth, Florida"].

<sup>3</sup> USC has filed an application for extension of the construction permit. See NPRM at ¶ 7 n. 4. KKTU has opposed this application. The NPRM correctly notes that it is unlikely that SCC's application meets the Commission's strict standards for extension of a construction permit. *Id.* USC filed a Supplement to its application for extension of the construction permit on September 14, 1993. KKTU will file a Supplement to its pending Petition to Deny USC's application for extension of the construction permit. The issues raised by USC's September 14, 1993 Supplement are discussed briefly below at ¶¶ 20 to 27.



site to SCC by claiming that there is no difference between the instant case and the case presented in Gary, Indiana. Nothing could be further from the truth.

8. In Gary, Indiana, the commercial permittee could not have moved its station to the site of the noncommercial permittee, due to the Commission's minimum spacing requirements. The noncommercial permittee's site was not short spaced. Thus, after the channel swap was approved in Gary, Indiana, neither the commercial permittee nor the noncommercial permittee was at a short spaced site. However, here SCC and USC are proposing a channel swap where SCC will be the ultimate beneficiary of a short spacing waiver granted to USC.

9. SCC and USC make the incredible claim that the fact that they are proposing a swap where SCC would acquire a construction permit for a short spaced site, which was not the case in Gary, Indiana, is "...of no decisional consequence." SCC/USC Joint Comments at 7 n. 10. The reason given by SCC and USC for this outlandish claim is that the "outcome" in both cases would be the same: a commercial station would be able to "...pursue service improvements which were previously unobtainable because of the Commission's minimum spacing requirements." SCC/USC Joint Comments at 7 n. 10. However, in doing so, USC and SCC are ignoring the fact that the channel swap in Gary, Indiana was accomplished without a commercial station acquiring a short spaced site granted to a non-commercial station. Because of the short spacing problem present in the instant case, the Gary, Indiana decision

cannot be relied upon in this proceeding.

10. SCC and USC also argue that it would be meaningless and wasteful to require SCC to accept the channel swap proposed by the NPRM and then have SCC file an application for a modification of facilities to specify the Cheyenne Mountain site. According to SCC and USC, the Commission has already decided that the public interest supports a grant of the construction permit with a short spacing waiver (i.e., it previously granted a waiver to USC) and, therefore, if SCC filed an application for the same short spaced construction permit previously granted USC, no new issues would be addressed. As a result, SCC and USC argue, requiring SCC to file for a short spacing waiver for the Cheyenne Mountain site would only cause delay and be a waste of resources. SCC/USC Joint Comments at 5 to 6. In making these arguments, SCC and USC are ignoring the public interest considerations which underlay the Commission's grant of USC's short spacing waiver request.

11. USC filed an application for a modification of its facilities, which included a request for a waiver of the Commission's minimum distance separation requirements, and the Commission granted this waiver based on the unique facts set forth in the USC application and waiver request. Indeed, the letter granting the waiver request stated, in pertinent part:

After careful review of your application, we are persuaded that grant of your waiver requests would serve the public interest. The Commission is mindful of the unique role played by many noncommercial television stations in providing public television service to wide areas. You have established that the University serves both the Pueblo and Colorado Springs areas and that is therefore important that your television station also do so as

well.

February 28, 1991 letter from Barbara A. Kreisman to Thomas Aube at 2.

12. The short spacing waiver granted to USC was based on the unique public interest considerations of USC providing public television service to the communities which USC already served in ways unrelated to the television station. Therefore, it is patently absurd to claim, as SCC and USC do, that "...no new issues would be addressed..." if SCC were required to apply for the short spacing waiver itself. If SCC were to apply for the short spacing waiver, it would be required to provide the Commission with information relating to all the public interest considerations applicable to the grant of a short spacing waiver of a commercial station which could not repeat USC's claims.

13. In reality, an SCC application for a short spacing waiver would involve entirely different public interest considerations than those presented by the prior application of USC for the waiver. As a result, requiring SCC to make the requisite public interest showing to justify a short spacing waiver would not be a meaningless exercise involving exactly the same facts and the with the same issues, as SCC and USC claim. Indeed, it is unlikely that the Commission would ever grant SCC such a short spacing waiver.

14. From the foregoing, it should be concluded that SCC and USC simply have failed to support their claim that Commission precedent mandates that the channel swap be approved with SCC acquiring USC's Cheyenne Mountain construction permit. To the

contrary, the facts and Commission precedent mandate that, if the Commission were to approve the channel swap (which it should not), SCC should be required to operate KOAA-TV from the Baculite Mesa site specified in USC's current license for KTSC-TV.

### III. USC Cannot Justify Extension Of The Construction Permit

15. USC and SCC argue that USC was prevented from implementing its construction permit because of "...circumstances beyond its control." In doing so, they admit that the only relevant circumstances were the pendency of their September, 1992 channel swap and USC's decision after September, 1992 that it was "...reasonable and prudent not to expend additional efforts and monies in furtherance of the Cheyenne Mountain Permit..." because effectuation of the channel swap would result in changes to KTSC-TV's "technical operations." SCC/USC Joint Comments at 10 n. 19. SCC and USC amplify this statement by arguing that "It made no rational or business sense to pursue implementation of a permit which, if the swap were approved, would ultimately be SCC's responsibility." SCC/USC Joint Comments at 11 (emphasis added).

16. Thus, SCC and USC admit that there were no circumstances (let alone circumstances beyond USC's control) which prevented construction of facilities by USC between February, 1991 (when the construction permit was approved) and September, 1992 (when the channel swap petition was filed with the Commission) -- a period of 18 months. Even after September, 1992, the circumstances upon which SCC and USC rely as being beyond USC's control are merely USC's voluntary decision to propose a channel swap with SCC and

USC's business decision subsequent to the filing of the channel swap application that it did not make "business sense" for USC to spend money on the construction permit while the channel swap was pending.

17. It is difficult to conceive of a fact pattern wherein a permittee experienced a delay in construction of facilities which is more the result of the permittee's own voluntary acts and where the permittee is less the victim of circumstances beyond its control than the fact pattern admitted by USC and SCC in this proceeding.

18. In addition, the Commission has made it crystal clear that it simply will not accept the pendency of a proposed transfer of a construction permit as a basis for the extension of a construction permit. Construction of Broadcast Stations, 102 FCC2d 1054, 59 RR2d 595 (1985); Community Service Telecasters, Inc., 6 FCC Rcd 6026, 69 RR2d 1608 (1991); Community Telecasters of Cleveland, Inc., 58 FCC2d 1296, 36 RR2d 1609 (1976).

19. SCC and USC attempt mightily to make factual distinctions between USC's situation and that of the permittee in New Dawn Broadcasting, 2 FCC Rcd 4383, 63 RR2d 1198 (1987), which is cited in the NPRM at ¶ 7 n. 7. However, in doing so, they ignore the plain and simple holding in New Dawn that a decision to defer construction based on business judgment is not a circumstance beyond the permittee's control. Id. 63 RR2d at 1200. The attempt by SCC and USC to rely on Nora Blatch Educational Communications Foundation, Inc., 50 RR2d 362 (1981), is also misplaced because the

Nora Blatch decision was rendered four years before the Commission adopted stricter standards for the granting of extensions of construction permits. Construction of Broadcast Stations, supra.

20. SCC's September 14, 1993 Supplement to its application for extension of the construction permit, mentioned on pages 10 - 11 of SCC/USC Joint Comments, actually reduces the already remote chance that the Commission will extend the construction permit.<sup>4</sup> While KKTV will provide a detailed explanation of the serious issues raised by SCC's September 14, 1993 Supplement in a supplement to its Petition to Deny, two issues will be pointed out here to demonstrate that the construction permit should not be extended.

21. On page 2 of the Amendment attached to the September 14, 1993 Supplement, USC asserts that it now has acquired an option to lease a transmitter site on Cheyenne Mountain. A copy of the signed option along with the form of the negotiated lease is attached to the Amendment as Exhibit 1.

22. An examination of the negotiated lease (at page 1) reveals that the tower in question is located at coordinates of Latitude 38° 44' 43.3" North and Longitude 104° 51' 41.3". The construction permit for USC's Cheyenne Mountain site (attached hereto as Exhibit B) specifies coordinates different from those specified in the lease, namely North Latitude 38° 44' 44.0" and West Longitude 104° 51' 39.0".

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<sup>4</sup> A copy of the Supplement is attached hereto as Exhibit A for ready reference in understanding KKTV's analysis in ¶¶ 20 - 27.

23. Thus, on the face of the September 14, 1993 USC Supplement, USC has revealed (although not addressed) the fact that it now proposes to lease space on a tower at a site which is not the site specified in its construction permit. As a result, the so-called negotiated tower lease attached to the option does not support USC's application for extension of the construction permit. To the contrary, it demonstrates that USC now must request a modification of its construction permit to specify a different site. USC has yet to request such a modification of its construction permit.

24. The fact that USC will require a modification of its construction permit before it can use its negotiated tower site is highlighted by the terms of the option itself. Recital D (Option Agreement at page 2) states: "Tenant [USC] would like to have the opportunity to move to the new 300 foot Tower when it is completed, if Tenant can obtain the approval of the FCC to make the move."

25. The SCC/USC Joint Comments also claim (at pp. 10-11) that "the University has also ordered equipment for the authorized modified Channel 8 operations...." This is a deceptive statement.

26. While Exhibit 2 attached to the Amendment included with the September 14, 1993 Supplement purports to be a letter from the University of Southern Colorado Foundation in which it is "...placing an order for equipment..." with Dielectric Communications, a careful reading of the letter shows that any "order" is illusory and does not support a finding that USC has made any progress toward the construction of the facilities specified in the con-

struction permit. The "order" is subject to several "conditions," including the following:

- a. the Foundation must make a five percent deposit of \$10,729.05;
- b. actual fabrication of the equipment "ordered" is not to proceed without formal authorization from the manager of KTSC-TV and the president of the Foundation;
- c. The authorization to proceed with fabrication can be made any time prior to June 30, 1994, at which time the "order" would expire; and
- d. If the "order" expires or is cancelled by the Foundation or USC prior to authorization, the deposit will be returned to the Foundation.

27. The so-called "order" actually does not commit USC or the USC Foundation to purchase any equipment, nor does it authorize the manufacturer to proceed with fabrication of the equipment. If USC or the USC Foundation does not authorize fabrication of the equipment by June 30, 1994 or if USC or the USC Foundation cancels the "order" prior to authorization, Dielectric will return USC Foundation's entire deposit. Therefore, the so-called "order" is, at best, an unexercised option to purchase equipment, which will cost USC and the USC Foundation nothing if the option is not exercised.

28. The facts and circumstances described by SCC and USC in their Joint Comments constitute a clear admission that USC made a business decision not to pursue construction once the channel swap petition was filed in September, 1992: "It made no rational or business sense to pursue implementation..." while the channel swap petition was pending. SCC/USC Joint Comments at 11. Given, these admissions, and the fact that SCC and USC have offered no other explanation for USC's failure to even begin to construct the per-



mitted facilities, the Commission is compelled to conclude that USC made a business decision to defer construction of facilities on Cheyenne Mountain and that, therefore, USC does not meet the strict standards for extensions of construction permits as set forth in Sections 73.3534(b) and 73.3535(b) of the Commission's Rules. In addition, SCC's latest Supplement to its application for extension of its construction permit actually demonstrates USC's total lack of effort to achieve construction of its permitted facilities on Cheyenne Mountain.

**IV. The Commission Can Refuse To Permit SCC To Acquire A  
Short Spaced Construction Permit Granted To USC**

29. SCC and USC claim, without citing any authority whatsoever, that, once a short spacing waiver is granted to a noncommercial station after a public interest determination, that determination and that waiver are binding on the Commission, no matter what happens thereafter. SCC/USC Joint Comments at 14. They go so far as to claim, again without any citation to authority, that the doctrine of res judicata requires the Commission to grant a request by SCC for the same short spacing waiver previously granted USC. SCC/USC Joint Comments at 14 to 15. SCC and USC then claim that the only factor the Commission can consider when it receives a request for a short spacing waiver is whether there will be objectionable interference to neighboring stations and that the Commission cannot consider non-technical factors, such as ownership or programming. SCC/USC Joint Comments at 15 to 16. Finally, USC and SCC claim that it would be unconstitutional for the Commission to

consider whether or not a station was commercial or noncommercial in considering whether or not to grant a short spacing waiver. None of these contentions withstands scrutiny.

30. The Commission grants waivers of its minimum distance spacing requirements based on a number of factors, not all of which are limited to the technical question of whether or not there will be objectionable interference to neighboring stations. The process of considering a request for a waiver of the minimum mileage separation requirements was recently described by the Commission as follows:

The Television Table of Assignments was established so that stations in a given community could operate with maximum power and antenna height without creating objectionable interference to other stations. To that end, it was necessary to establish minimum mileage separations. Those spacing requirements presumptively serve the public interest, and applicants seeking waivers to operate from short-spaced sites are required to demonstrate that the public interest will be better served by a waiver in the circumstances presented than by following the terms of the Rule. When a licensee seeks waiver of our spacing rules, we have examined several factors: (1) the unsuitability of the existing site, either in terms of the economic viability of the station, in technical terms, or in a licensor's inability to reach areas containing a significant number of viewers who lack a service, a network service, or "independent" service; see Roy H. Park B/casting, Inc., 45 RR 2d 1083 (B/c Bur 1972); WSET, Inc. (WSET-TV), 80 FCC 2d 233 (1980); (2) the magnitude of the short-spacing; compare Clay B/casting Corp., 50 RR 2d 1273, recon. denied, 51 RR 2d 916 (1982) (approval of a five mile shortfall out of 190 required) with West Michigan Telecasters, Inc., 22 FCC 2d 943, recon. denied, 26 FCC 2d 668 (1970), aff'd 460 F.2d 883 (DC Cir 1972) (denial of 15 mile shortfall out of 170 required); (3) the nature and extent of the predicted loss of service that would result from a grant of the short-spacing; see Roy H. Park B/casting, Inc., supra; and Blair B/casting of California, Inc., 55 RR 2d 619 (MMB 1984); the aeronautical and environmental benefits and drawbacks of locating a tower in a particular area, see Roy H. Park B/casting, Inc., supra, (5) the concerns, if any, ex-

pressed by the licensee(s) to which the short-spacing would result, see WSET, Inc., supra; and WLCY-TV, Inc., 16 FCC 2d 506 (Rev. Bd. 1969), review denied, 25 FCC 2d 832 (1970). See generally, Caloosa Television Corp. (Caloosa), 3 FCC Rcd 3656 (1988), recon. denied, 4 FCC Rcd 4762 (1989) (Commission granted waiver where applicant reached 40 percent fewer households than competitor).

Western B/casting Corp. of Puerto Rico, 69 RR 2d 718, 720 (MMB 1991).

31. USC addressed the public interest factors other than the technical interference factor in its Amendment to Request for Waiver" dated March 7, 1990.<sup>5</sup> In its Amendment to Request for Waiver, USC claimed that its signal to Colorado Springs was inadequate due to shadowing and that its loss of a translator serving Colorado Springs would result in some viewers in Colorado Springs losing over-the-air service from KTSC-TV. USC asserted that

...Colorado Springs is part of the area which the University of Southern Colorado was created to serve, not only its broadcast station, but also by the various educational and outreach services which the University provides to that area of the State of Colorado."

Amendment to Request for Waiver at 1.

32. USC further contended that it was

...confronted with the impending loss of the service which it has provided to Colorado Springs, and the financial support from Colorado Springs residents which is of significant importance to the entire broadcast operation. The instant application [for the construction permit for an antenna site on Cheyenne Mountain] appears to be the only possible mechanism for the University to achieve its basic mission to provide educational service to all of the people of this area.

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<sup>5</sup> A copy of the Amendment to Waiver Request is part of Exhibit 7 to KKTU, Inc.'s Petition for Issuance of Order to Show Cause, which is attached as part of Exhibit D to Comments of KKTU, Inc. filed in this proceeding.

Amendment to Request for Waiver at 1 to 2.

33. Thus, USC affirmatively argued its case for a waiver using the public interest considerations presented by its own unique circumstances as part of its successful effort to achieve a waiver of the minimum separation requirements. Now, USC and SCC are arguing that these same public interest considerations cannot be considered and that only technical interference can be considered in their effort to gain Commission approval of a scheme where SCC, and not USC, will take advantage of the short spaced site.

34. The factual bases for the public interest considerations analysis undertaken in a new request for a spacing waiver by SCC would be fundamentally different than those present when the USC waiver request was considered. Thus, the claim that a grant of a waiver to SCC would be required by the doctrine of res judicata, SCC/USC Joint Comments at 14 to 15, demonstrates a total lack of understanding of both the differences between the public interest factors present in the USC and SCC situations and the doctrine of res judicata.<sup>6</sup>

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<sup>6</sup> Res judicata prevents relitigation of claims as to either issues of law or fact by the parties to earlier litigation, if such issues could have been raised or determined. It does not apply to the claims of strangers to the earlier litigation or to claims that could not have been raised in the earlier litigation. See generally, 1B Moore's Federal Practice ¶ 0.401. In the instant case, the public interest issues present in a request for a waiver by SCC could not have been considered in an earlier proceeding considering a waiver request from USC. Also, since SCC was not a party to the USC waiver request proceeding, res judicata by definition is not applicable to any waiver request by SCC.

35. Finally, the claim by USC and SCC that it would be "unconstitutional" for the Commission to premise a waiver of a technical rule on the basis that some programming (noncommercial programming) is superior to other types of programming (commercial programming) is without merit. In the first instance, USC specifically argued in its request for the short spacing waiver that it should receive a waiver because it provided educational programming. As a result, USC hardly is in a position to complain that it unconstitutionally received a waiver which it actively sought. If such an unconstitutional waiver was granted, the remedy is for the Commission to cancel USC's waiver, not to extend the unconstitutional waiver to SCC.

36. Secondly, the Commission routinely considers the type of programming service as a public interest consideration. As noted above, the type of programming service is considered as one of the public interest factors in reviewing a request for a short spacing waiver. Western B/casting Corp. of Puerto Rico, supra; Caloosa, supra. The type of service which may be considered as a public interest factor is not limited to noncommercial service and can be a) a lack of service of any kind, b) lack of network service or c) a lack of an "independent" service. Id. It just so happens that, with USC's application for a waiver, the Commission considered that KTSC provided noncommercial service, that USC served the Colorado Springs area in a number of ways, including the provision of non-commercial television service, and that significant financial support for KTSC-TV would be jeopardized if the short spacing

waiver was not granted. Therefore, the alleged constitutional problem claimed by SCC and USC is non-existent.

**V. The Channel Swap Will Cause Losses of Service And Is Not In The Public Interest**

37. SCC and USC continue to claim that gains in noncommercial service require a determination that the proposed channel exchange is in the public interest. SCC/USC Joint Comments at 20 to 22. As demonstrated in KKTU, Inc.'s September 3, 1993 Comments, this is demonstrably not the case with respect to a channel swap where both stations maintain their transmitters on Baculite Mesa, as proposed in the NPRM. See Comments of KKTU, Inc. at 6 to 10.

38. Despite the NPRM, SCC and USC are again attempting to gain consideration and approval of a channel swap where SCC would be permitted to acquire USC's construction permit for an antenna site on Cheyenne Mountain. Permitting SCC to use the Cheyenne Mountain site would result in an even greater public injury than that which would occur if the channel swap were permitted as proposed in the NPRM.

39. In considering a channel swap, the Commission considers the extent to which there are gains and losses of service which would occur if the swap were approved. See, e.g., Clermont and Cocoa, Florida, 67 RR2d at 268; Boca Raton and Lake Worth, Florida, NPRM at ¶¶ 4 to 5. If the Commission were to permit the channel swap and also permit SCC to operate KOAA-TV from USC's construction permit site on Cheyenne Mountain, the number of people who would lose their only off-air primary commercial service (KOAA-TV) would

far exceed the number of people who would gain first off-air primary noncommercial service (KTSC-TV).

40. Attached hereto as Exhibit C is the Technical Exhibit and Affidavit of Richard S. Graham, Jr. Exhibit C clearly establishes that, if the channel swap were permitted and if SCC were permitted to operate KOAA-TV from USC's construction permit site on Cheyenne Mountain, 29,367 people would lose their only off-air primary commercial service (KOAA-TV).<sup>7</sup> Exhibit C at Exhibit # 2. This service loss dwarfs the 2,906 people who would gain their first off-air primary noncommercial service if the swap is approved. Exhibit C to Comments of KKTU, Inc.

41. The Commission has made it clear that "...once in operation a station has an obligation to maintain service to its viewing audience, and that the withdrawal or downgrading of service is justifiable only if offsetting factors associated with the proposal establish that the public interest will be benefitted." KTVO, Inc., 57 RR2d 648, 649 (1984). Any loss of service is *prima facie* inconsistent with the public interest. Coronado Communications, 8 FCC Rcd 159, 71 RR2d 1250, 1254 (Chief, Video Serv. Div.

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<sup>7</sup> Exhibit C also reinforces the point made in Comments of KKTU, Inc. that, in granting USC the construction permit in 1991, the Commission erred in failing to examine the loss of noncommercial service that would result from permitting USC to move KTSC-TV's antenna site from Baculite Mesa to Cheyenne Mountain. Although, the Commission claimed, with no basis in the record, that areas which would lose service from KTSC-TV if the station were permitted to move to Cheyenne Mountain were "largely unpopulated," (February 28, 1991 letter from Barbara A. Kreisman to Thomas Aube), in fact, 39,196 people would lose their only noncommercial service if USC moved its transmitter from Baculite Mesa to Cheyenne Mountain. Exhibit C at Exhibit # 4.

1992). The NPRM correctly notes that the translator service proposed by USC can be lost at any time and simply is not a substitute for off-air primary service. NPRM at ¶ 9. See also Comments of KKTU, Inc. at ¶¶ 41 to 49. Nothing in the SCC/USC Joint Comments even remotely addresses the fundamental inadequacy of translator service as an alternative to off-air primary service.

42. The Commission must conclude that the losses in service which would result from any channel swap between SCC and USC mandate that the channel swap not be approved. The massive losses in first off-air primary commercial service which would result were the Commission to approve a channel swap which permitted SCC to operate KOAA-TV from Cheyenne Mountain is particularly contrary to the public interest.

#### VI. Conclusion

43. The channel swaps proposed by the NPRM and by SCC and USC are not in the public interest. The SCC/USC Joint Comments in this proceeding have not identified any basis for the Commission to approve any channel swap between SCC and USC, no less a channel swap where SCC is permitted to operate KOAA-TV from the Cheyenne Mountain site specified in USC's construction permit, as SCC and USC continue to propose. In addition, SCC and USC have failed to make a showing of continuing interest as required by the NPRM. Therefore, the Commission should rule that the proposed channel swap is not in the public interest and terminate the rulemaking proceeding without adoption of an amendment to the Television Table of Allotments.



WHEREFORE, KKTU, Inc. requests that the Commission find that the proposal of University of Southern Colorado and Sangre de Cristo Communications, Inc. to exchange channels is not in the public interest and that the Commission terminate this rulemaking proceeding without adoption of any amendment to the Television Table of Allotments.

Respectfully submitted,

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